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IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, creates an exclusive federal cause of action and an exclusive federal remedy for usury claims by borrowers against national banks, preempting state law under the doctrine of ordinary preemption. Borrowers filed this case against a national bank in state court, claiming violation of state usury law, and the national bank removed the case to federal district court, where a motion to remand was denied. On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit ordered the district court to remand the case to state court for lack of subject matter jurisdiction and explicitly disagreed with decisions by the United States Court of Appeals for the Eighth Circuit holding that section 30 completely preempts state usury claims against national banks and thus permits removal of cases asserting state usury laws against them. The question presented is:

> Whether a usury claim against a national bank, even if ostensibly brought under state law, necessarily arises under section 30 of the National Bank Act so as to permit a federal court to exercise removal jurisdiction under the doctrine of complete preemption, a question as to which the United States Courts of Appeals are in conflict?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellants:

Marie Anderson
Alvester Brafort
Walter Brutley
Patricia Coleman
Talaya Cope
Audrey Darby
Annie Davis
April DeLoach
Diane Franklin
Lillie Franklin
Willie Lewis
Caledonia Jackson
Shirley Jernigan
Evelyn Nelson
Willie Lawrence
Mamie Mitchell
Betty Person
Diane Peterson
Gwen Rogers
Williams Screws
Ernestine Starks
Gerald Stokes
Albert Thomas
Charles Thomas
Kenneth Williams
Earline Young

Defendants-Appellees:

Beneficial National Bank
Beneficial Tax Masters, Inc.
H&R Block, Inc.

RULE 29.6 LIST

Household International, Inc. is the parent of Beneficial National Bank and Beneficial Tax Masters, Inc. and is publicly held.

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Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Beneficial National Bank and Beneficial Tax Masters, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 287 F.3d 1038. The opinion of the United States District Court for the Middle District of Alabama (App. 21a) is reported at 132 F. Supp. 2d 948.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on April 3, 2002. The court of appeals denied timely petitions for rehearing en banc (constituting also petitions for panel rehearing) in an order entered May 29, 2002 (App. 29a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 30 of the National Bank Act, 12 U.S.C. §§ 85 (App. 30a), 86 (App. 32a). It also involves 28 U.S.C. §§ 1331 (App. 33a), 1441 (App. 34a).

STATEMENT OF THE CASE

At all times pertinent hereto, Petitioner Beneficial National Bank ("Beneficial") was a national bank chartered under the National Bank Act ("NBA") and subject to the supervision of the Office of the Comptroller of the Currency, United States Department of the Treasury ("OCC"). Beneficial allegedly made tax refund anticipation loans ("RALs") to the respondents, who were tax-preparation customers of defendant H&R Block, Inc. A RAL is a loan made by a bank in the amount of the borrower's anticipated tax refund less interest and fees, enabling the borrower to receive the money more quickly than a tax refund.

The respondents brought suit in Alabama state court against the petitioners, Beneficial and its affiliate Beneficial Tax Masters, Inc., and also against H&R Block, Inc., a tax preparation service, alleging that Beneficial charged usurious interest on the RALs it made to the respondents. The complaint asserts usury claims based on Alabama Code § 8-8-1 and the common law and does not mention section 30 of the NBA (App. 30a-32a).

The petitioners and H&R Block, Inc. timely removed the case to the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. § 1441(a) and (b) (App. 34a). Jurisdiction was invoked under 28 U.S.C. § 1331 (App. 33a) on the grounds that the action necessarily arose under the laws of the United States. The respondents moved to remand the case to state court. The district court denied the motion, holding that the claims alleging that Beneficial had charged usurious interest necessarily arose under section 30 of the NBA and thus created federal question or "arising under" jurisdiction pursuant to 28 U.S.C. § 1331, permitting removal under the doctrine of complete preemption. App. 28a. The district court certified the issue for interlocutory appeal.

On appeal, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision on the grounds that Congress did not clearly express an intent to permit removal under section 30 of the NBA and, therefore, complete preemption did not apply. App. 16a. The dissenting opinion concluded that the doctrine of complete preemption should apply to allow removal. *Id.* at 17a-20a.

The majority stated that removal based on federal question or "arising under" jurisdiction "generally is governed by the 'well-pleaded complaint' rule, which provides that a case may be removed only if the plaintiff's properly pleaded complaint reveals that the claim is based on federal law." *Id.* at 5a (citation omitted). However, the majority recognized that this Court has adopted an exception to this rule–the complete preemption doctrine, which allows removal when "the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)) (internal quotation marks omitted) (bracket in original).

The majority acknowledged that this Court's case law has established that section 30 of the NBA "governs the amount of interest a national bank may charge . . . and provides the exclusive remedy for usury claims against a national bank." App. 13a (citations omitted).[1] Nevertheless, the court held that more is needed for federal removal jurisdiction under complete preemption.

The majority analyzed Supreme Court and Eleventh Circuit decisions on complete preemption and concluded that "congressional intent is the pivotal issue." *Id.* at 8a-9a. The court emphasized that in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), this Court applied the complete preemption doctrine to permit removal after finding a clear congressional intent to permit removal with respect to the statute in question in that case. App. 8a-9a.

After reviewing the legislative history of the NBA, enacted in 1864 during the Civil War, the majority acknowledged that Congress intended to protect the national banking structure from state control and regulation and to protect the newly created national banks from state legislation. *Id.* at 9a-11a. The majority also acknowledged that the NBA was enacted before the statute establishing original federal "arising under" jurisdiction,[2] the general removal statute,[3] the well-pleaded

[1] Section 30 of the NBA has been codified as 12 U.S.C. §§ 85-86. 12 U.S.C. § 85 creates a federal usury standard by allowing a national bank to charge interest

> at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .

App. 30a. 12 U.S.C. § 86 provides the exclusive remedy for usury violations by a national bank. *See* App. 32a.

[2] Judiciary Act of 1875 §§ 1, 2, 18 Stat. 470 (1875).

[3] *Id.*

complaint rule[4] or the complete preemption doctrine.[5] However, it did not consider the fact that removal jurisdiction had not yet been invented in 1864 to be a sufficient basis to forego a showing of specific congressional intent to allow removal. The majority held that, since it could not find a clear congressional intent to permit removal, removal was improper. App. 13a.

In so ruling, the majority acknowledged that its conclusion directly conflicted with decisions of the United States Court of Appeals for the Eighth Circuit that national banks can remove actions alleging usury claims under state law to federal court under complete preemption. *Id.* at 13a-14a. The majority stated that those decisions found complete preemption "based solely on well-settled law that [section 30] . . . provides the exclusive remedy for usury claims against a national bank." *Id.* at 13a. In the majority's view, an expression of specific congressional intent to permit removal was also required.

The petitioners and H&R Block, Inc. timely filed petitions for rehearing en banc, which were denied on May 29, 2002 (App. 29a). The petitioners then sought, and on June 17, 2002, obtained, a stay of the court of appeals' mandate pending the filing of this petition for a writ of certiorari and this Court's disposition (App. 36a).

REASONS FOR GRANTING THE WRIT

As the court of appeals has acknowledged, its two-to-one decision to deny removal jurisdiction in this case directly conflicts with decisions of the United States Court of Appeals for the Eighth Circuit. Numerous conflicting district court opinions exist in other circuits as well, and the conflict can be

[4] *Little York Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877).

[5] *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

resolved only by this Court. The ability of national banks to remove usury cases to the federal courts is important to the uniform administration and enforcement of the NBA, as urged by the OCC, the federal government agency charged with interpreting the NBA, in an *amicus curiae* brief in the court below (App. 38a). The court of appeals decision also is inconsistent with more than one hundred and twenty-five years of decisions by this Court recognizing that all usury claims against national banks are necessarily federal.

1. The Court of Appeals Decision Directly Conflicts with Decisions of the United States Court of Appeals for the Eighth Circuit.

(a) Direct Conflict.—The court of appeals decision created a direct and expressly acknowledged conflict with decisions of the United States Court of Appeals for the Eighth Circuit which held that state usury claims against a national bank are completely preempted by section 30 of the NBA and thus are properly subject to removal by the national bank. App. 3a n.5 & 13a (citing *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000); *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991)).[6]

In considering this issue in the *Nahas* case, the Eighth Circuit took note of this Court's determination that "Congress has prescribed in the national banking laws precisely what remedies are available against a national bank for usury, in

[6] The United States Court of Appeals for the Fifth Circuit recently recognized the existence of this conflict. *See Heaton v. Monogram Credit Card Bank of Ga.*, No. 01-30104, 2002 U.S. App. LEXIS 13599, at 2 n.1 (5th Cir. July 8, 2002, revised July 22, 2002) ("The courts of appeals are divided as to whether [12 U.S.C.] §§ 85 and 86 completely preempt state-law usury claims against a national bank so as to confer federal subject-matter jurisdiction over such claims.") (comparing *Anderson*, 287 F.3d 1038, with *Krispin*, 218 F.3d at 922).

order to promote remedial uniformity and to protect national banks from destructive usury penalties frequently available under state law." *Nahas*, 930 F.2d at 610 (citing *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 32-33 (1875)). The Eighth Circuit cited a line of this Court's decisions holding that, "'since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties.'" *Id.* (quoting *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 881 (8th Cir. 1975), and citing *McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245 (1938), and *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555 (1879)).

The Eighth Circuit then analyzed removal jurisdiction and the exception to the "well-pleaded complaint" rule provided by the complete preemption doctrine. It relied on this Court's decision in the *Taylor* case for the proposition that the doctrine is "limited to federal statutes that 'so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal.'" *Nahas*, 930 F.2d at 612 (quoting *Taylor*, 481 U.S. at 65)). In considering this Court's first complete preemption case, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), the Eighth Circuit stated that "*Avco* thus illustrates that this type of removal is most appropriate where Congress has created an exclusive federal remedy that displaces any overlapping or inconsistent state remedies." 930 F.2d at 612. The court held that, since section 30 of the NBA provides an exclusive federal remedy for usury claims against national banks, any civil complaint raising claims of excessive interest against a national bank is "necessarily federal in nature and properly removable." *Id.* at 612. The court added that this result would apply "whether or not [a] plaintiff artfully attempted to couch its complaint wholly in state law terms" and that "a plaintiff cannot thwart the removal of a case by inadvertently, mistakenly or

fraudulently concealing the federal question that would necessarily have appeared if the complaint had been well pleaded." *Id.*[7]

The primary difference in analysis between the Eleventh Circuit's decision below and the Eighth Circuit's contrary decisions is the Eleventh Circuit's requirement of a specific congressional intent to permit removal of cases purporting to be grounded entirely in state law. The Eighth Circuit relies instead on the undisputed congressional intent to federalize all usury claims against national banks and considers that intent to be a sufficient basis for finding federal "arising under" jurisdiction. This difference is at the core of the issue presented to this Court.

(b) Other Conflicting Decisions.—Other circuits have also addressed the issue in conflicting decisions. The Fifth Circuit summarily affirmed a district court decision holding that section 30 of the NBA allows removal of state usury claims under complete preemption. *Battiste v. H&R Block, Inc.*, 209 F.3d 719 (5th Cir. 2000), *aff'g* No. 97-749-A (M.D. La. Jan. 13, 1998) (App. 59a.) However, a divided panel of the Third Circuit decided that complete preemption does not permit removal of a case purporting to assert state usury law against a national bank. *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548, at *6-7 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). The Third Circuit vacated that decision and ordered rehearing en banc. Before the full court could address the issue, however, the plaintiffs dismissed the case.

[7] In its more recent decision in the *Krispin* case, the Eighth Circuit relied on its analysis in the *Nahas* case to affirm a lower court's application of the complete preemption doctrine to usury claims pursuant to section 30 of the NBA. *See* 218 F.3d at 922.

Similar to the Eleventh Circuit opinion below, the majority of the Third Circuit panel in the *Spellman* case adopted a standard for complete preemption requiring a clear and specific congressional intent to permit removal of purported state-law claims. 1995 WL 764548, at *3. The dissenting opinion took the position that such specific congressional intent was not necessary. The dissent stated,

> Congress wrote the National Bank Act in 1864, long before the "well-pleaded complaint" rule and the complete preemption doctrine were enunciated. We could not expect the Congress which enacted the National Bank Act to have discussed the federal question jurisdiction or removal implications of 12 U.S.C. §§ 85 & 86, since neither general federal question jurisdiction nor general removal power existed in 1864. Under these circumstances, the majority's requirement of an explicit showing of congressional intent to allow removal is too strict. Instead we should look to less direct evidence of what Congress intended regarding the role of federal courts in enforcing the National Bank Act.

1995 WL 764548, at *21 (Scirica, J., dissenting) (footnotes omitted). After having examined the legislative history of the NBA, the dissent found that Congress intended for usury claims against national banks to be "governed by a body of federal law which the federal courts would apply." *Id.* at *24. Stating that the usury claims were "a federal case in state wrapping paper," it concluded that removal of the case was proper. *Id.*

Decisions among the district courts are also divided. A number of district courts in other circuits have adopted the Eighth Circuit view that removal is proper. *See Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146, 149 (D.S.C. 1993) (collecting cases). However, other courts have

remanded cases removed by national banks. *See, e.g., Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993).

(c) Consequences of Conflict.—Without a decision of this Court, the conflicting law on this issue will subject national banks to different standards regarding removal depending on the circuit in which they are sued. Where removal is not permitted, national banks will be potentially subject to the vicissitudes of multiple state fora and deprived of the benefits of federal court expertise and federal court uniformity of decision. Their only relief from state court misinterpretations will be a petition for certiorari to this Court, a review not available as of right and generally reserved for issues transcending the rights and duties of the particular litigants. Such disparity of treatment is contrary to the congressional intent to create a uniform, nationwide banking system. *See, e.g., Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) ("Congress intended to facilitate . . . a 'national banking system.'"); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 32 (1875) (stating that section 30 of the NBA creates "a system of regulations [where] [a]ll the parts are in harmony with each other, and *cover the entire subject*")(emphasis added).

The conflict will not be resolved absent a decision of this Court. The district courts in the Eighth and Eleventh Circuits will follow the conflicting mandates of their respective courts of appeals. The Eighth Circuit's position has been firmly established since the *Nahas* decision in 1991. The Eleventh Circuit is unlikely to have another opportunity to consider the issue: district courts within the circuit will remand any usury complaints against national banks purporting to raise state claims alone, and remand orders based on lack of subject matter jurisdiction are generally "not reviewable on appeal or

otherwise." 28 U.S.C. § 1447(d); *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995).

The issue at bar is ripe for this Court's review. It is a purely legal issue that has been thoughtfully considered and thoroughly analyzed by the lower courts for over a decade, and the conflicting rulings require resolution by this Court.

2. The Court of Appeals Decision Is Erroneous and Is Inconsistent With This Court's Longstanding Position That All Usury Claims Against National Banks Arise Under Federal Law.

(a) Erroneous Analysis.—The Eleventh Circuit's approach to the complete preemption doctrine is flawed. It requires a determination that Congress specifically intended to permit removal in cases where state claims preempted by a federal statute under the ordinary preemption doctrine are filed in state court. Such intent presumptively would not be expressed in the federal statute itself; if it were, there would be no need for the doctrine of complete preemption—it would be a case of "read the statute." The Eleventh Circuit requires instead that the intent to permit removal of spurious state law claims be discerned from legislative history. The NBA necessarily fails the Eleventh Circuit's test because Congress could not possibly have considered removal in 1864 when it passed the statute: general removal of actions "arising under" federal law had not yet been invented. The NBA fails this test because it was born too soon.

None of the decisions by this Court supports the Eleventh Circuit's analysis. The proper analysis is whether the preemptive force of the federal statute makes the assertion of a state-law claim completely impossible, so that the claim in question must be viewed, despite the plaintiff's characterization, as "arising under" federal law. That depends on the clarity and specificity with which Congress completely federalized the law relating to the claim involved.

In light of this Court's decisions interpreting section 30 of the NBA, it is hard to imagine a clearer case of complete preemption under this approach than that presented by the case at bar and cases like it.

Suits like this one are not rarities; filing them may be a cottage industry of some size. Complaints similar to the complaint in this case are found in a number of reported cases.[8] There may well be others; remand orders may rarely be reported. Why are these cases filed in state court, seeking recovery only under clearly preempted state usury laws? Assuredly the cases are not filed with a view to provide martyrs to the force of the Supremacy Clause through rapid dismissal for failure to state a claim on which relief can be granted. Success, not defeat, presumably motivates these filings. Whether the purpose is to defeat federal removal jurisdiction and then assert a violation of federal law in state court or, more likely, to convince a busy state court judge, with little or no staff, that state law actually applies instead of the federal law, hoping to get a settlement before the case arrives at the state appellate level, is not entirely clear. The latter seems to be the case, since a formal amendment to

[8] *See Jones v. Bankboston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000); *Fortenberry v. Southtrust Bank of Ala. Nat'l Assoc.*, No. CV-95-B-1691-J, 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. 1996); *Moss v. Southtrust Mobile Servs.*, No. CV-95-P-1647-W, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. 1995); *Hunter v. Rich's Dep't Stores*, 945 F. Supp. 1500 (N.D. Ala. 1995); *Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146, 149 (D.S.C. 1993); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993); *Goehl v. Mellon Bank*, 825 F. Supp. 1239 (E.D. Pa. 1993), *rev'd, Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996); *Ament v. PNC Bank*, 825 F. Supp. 1243 (W.D. Pa. 1992) (same subsequent history); *Nelson v. Citibank (S.D.) N.A.*, 794 F. Supp. 312 (D. Minn. 1992); *Beeman v. Mbank Houston, N.A.*, 691 F. Supp. 1027 (S.D. Tex. 1988).

allege a claim arising under federal law might give rise to a second attempt to remove (or an initial effort to remove, in a circuit like the Eleventh Circuit). Moreover, in the typical case there may well be *no* violation of federal law, and the suits are attempts to collect damages for nonconformity with an inapplicable, preempted state law. What is plain is that, in either case, the procedure is an abuse, and we believe this Court ought to look carefully at a decision, like that of the Eleventh Circuit, which permits, if not encourages, such an abuse.

(b) This Court's Interpretation of Section 30.— The court of appeals decision below failed to recognize the significance of the unbroken line of this Court's decisions dating back to *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29 (1875), uniformly recognizing that all usury claims against national banks are necessarily federal.[9] These cases demonstrate that the NBA not only preempts state usury claims against a national bank under the ordinary preemption doctrine, but also federalizes any such claims by establishing both an exclusive federal claim and an exclusive federal remedy.

In the seminal *Dearing* case, decided shortly after enactment of the NBA, this Court held that federal standards for national bank interest rates pursuant to section 30 of the NBA establish a federal remedy for usury that precludes state remedies. 91 U.S. at 34. The Court characterized the provisions of section 30 of the NBA as follows: "These clauses, examined by their own light, seem to us too clear to

[9] *See, e.g., Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737, 744 (1996); *Marquette Nat'l Bank*, 439 U.S. at 308 (1978); *McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245, 245-46, 248 (1938); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109, 114 (1919); *Haseltine v. Cent. Nat'l Bank of Springfield*, 183 U.S. 132, 134 (1901); *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555, 558-59 (1878); *Dearing*, 91 U.S. 29, 34-35 (1875); *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 410-11 (1873).

admit of doubt as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other, *and cover the entire subject*." *Id.* at 32 (emphasis added). The Court rejected a construction of the NBA that would permit state law to define remedies for usury by national banks, ruling that "States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.* at 34. Moreover, "[t]he power to supplement [section 30] by State legislation is conferred neither expressly nor by implication." *Id.* at 35.

This core principle was reiterated three years later in *Barnet v. Muncie National Bank*, 98 U.S. 555, 558 (1878): "The [state] statutes . . . upon the subject of usury . . . cannot affect the case. Where a statute [the NBA] creates a new right or offence, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."

Forty years later, in *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919), the Court reiterated its holding in the *Dearing* and *Barnet* cases, stating that "[w]hether transactions by [a national bank] are usurious and the consequent penalties therefor[] *must* be ascertained upon a consideration of the National Bank Act." *Evans*, 251 U.S. at 109 (emphasis added). More recently, the Court has consistently recognized that section 30 of the NBA governs all usury claims against national banks. *See, e.g.*, *Smiley*, 517 U.S. at 737 (1996); *Marquette Nat'l Bank*, 439 U.S. at 318-19 (1978).

Thus, it is clear from the Court's decisions that the NBA not only preempts state claims for usury against a national bank, but also federalizes any such claims. Since Congress intended the NBA to occupy the entire field, all usury actions against national banks necessarily present a question arising under federal law. Artful pleading by plaintiffs in an attempt to cloak the federal claim in state law garb should not preclude removal. As urged in the OCC's *amicus* brief

below, "where [as here] Congress clearly wished to displace state law by creating an exclusive federal remedy and stressed the importance of uniformity in the fledgling national banking system, a finding of complete preemption is appropriate." App. 55a.

(c) This Court's Complete Preemption Cases.—A finding that section 30 of the NBA completely preempts state law usury claims would be consistent with this Court's application of the complete preemption doctrine. To date, the Court has found complete preemption under two statutes: section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968), and section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987).

In the first of these cases, *Avco*, the Court said nothing concerning the possible existence of congressional intent to permit removal of claims purporting to arise solely under state law. Instead, it focused its analysis of removal jurisdiction solely on the fact that section 301 of the LMRA, 29 U.S.C. § 185, provided a federal right of action to enforce or construe collective bargaining agreements entered into under federal labor laws. 390 U.S. at 559-60. Finding that state law "will not be an independent source of private rights" in such cases, *id.* at 560, the Court concluded that it was "clear that the claim under [the] collective bargaining agreement is one arising under the 'laws of the United States' within the meaning of the removal statute." *Id.*

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983), the Court elaborated on the rationale for the *Avco* decision as follows:

> The necessary ground of decision was that the preemptive force of . . . [the federal statute] is so

> powerful as to displace entirely any state cause of action . . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of . . . [the federal statute]. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

The Court determined that complete preemption was not established in the *Franchise Tax Board* case since Congress did not preempt all state causes of action or provide a federal remedy. 463 U.S. at 25-26. The Court had nothing to say about specific congressional intent to permit removal of a purported state-law claim.

In the later *Taylor* case, this Court stated that the complete preemption doctrine permits removal in the following circumstances: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." 481 U.S. at 63-64. The Court framed the issue as "whether the[] state common law claims are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." 481 U.S. at 60. The Court looked to "whether or not the *Avco* principle can be extended" to the ERISA context. *Taylor*, 481 U.S. at 64. While noting a similarity between the jurisdictional language of ERISA's civil enforcement provisions and that of the LMRA, the Court declared that, absent an "explicit direction from Congress, this question would be a close one." 481 U.S. at 64. The Court did not have to resolve that "close one," finding such explicit direction in the form of legislative

history stating that actions like the one in issue were to be "regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA]." *Id.* at 65-66. Accordingly, the Court held that removal was proper. In so holding, this Court did not state that a specific congressional intent to permit removal was prerequisite to a finding of complete preemption; it simply found that there was such a specific intent present there. *See id.* at 65-66.

3. The Issue Is Important to the Uniform and Effective Operation of the National Banking System.

The ability of national banks to remove usury claims against them to the federal courts is vital to the uniform development of the NBA and the uniform treatment of national banks facing usury claims. For this reason, the OCC, the federal government agency charged with interpreting the NBA, supervising all national banks and protecting the safety and soundness of the national banking system, filed an *amicus curiae* brief in the court below strongly urging that national banks should be allowed to remove usury claims purporting to arise under state law pursuant to the complete preemption doctrine. App. 47a-55a. The OCC's participation in the case underscores the importance of the issue to the national banking system. The majority decision below simply ignored the OCC's views.

The NBA was enacted in 1864 to create a national banking system consisting of federally chartered national banks which are "'instrumentalit[ies] of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.'" *Marquette Nat'l Bank*, 439 U.S. at 308 (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). This Court has repeatedly

stated that, in adopting the NBA, Congress intended to create a uniform nationwide banking system. *See, e.g.*, *id.* at 314-15.

Pursuant to this purpose, Congress adopted a federal standard for interest rates to be charged by national banks (App. 30a) and an exclusive federal remedy for violations of that standard in section 30 of the NBA (App. 32a). As the OCC stated in its *amicus* brief in the court below, this provision was an important feature of the NBA because loans are typically the major assets of a national bank and interest is its principal source of income. App. 48a-49a. Congress clearly intended to protect national banks from state interference in this area: section 30 "was considered indispensable to protect . . . [national banks] against possible unfriendly state legislation." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 412 (1873). Permitting removal of usury claims against national banks is vital to providing such protection and to ensuring the uniform development of the law and its uniform application to national banks, wherever they may be sued.

4. This Case Presents an Opportunity for the Court to Provide Much-Needed Guidance on the Complete Preemption Doctrine.

This Court has not visited the issue of complete preemption in the past fifteen years or outside the contexts of the LMRA and ERISA. As a result, the lower federal courts have adopted differing standards of application. This case would provide a useful vehicle for this Court's resolution of those differences.

Courts and commentators agree that there is great confusion in the lower courts over the application of complete preemption. As the Eleventh Circuit recognized in an earlier case, "[c]ourts . . . have struggled to define the exact contours of the complete preemption doctrine[, and] [t]he results have

varied." *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 856 (11th Cir. 1999). The Tenth Circuit has noted, "the scope of the doctrine is not entirely clear: '[t]he evolution of the doctrine . . . has been one of fits-and-starts and zig-zags [and] has, not surprisingly, occasioned both confusion and disagreement among the federal circuit and district courts.'" *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir. 1996) (quoting *Burke v. Northwest Airlines, Inc.*, 819 F. Supp. 1352, 1356 (E.D. Mich. 1993) (brackets in original)). Professor Arthur Miller concurs, concluding his examination of cases by declaring that "[t]he application of the complete-preemption doctrine is unclear" because of the Court's failure to "enunciate[] clear principles for identifying completely preempted claims beyond the LMRA and ERISA contexts . . . ." Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1797 (June 1998).[10]

As a result, there is a broad range of approaches to the complete preemption doctrine among the courts of appeals.[11] One of the primary issues of confusion and conflict among the circuits is the role of congressional intent: whether Congress must specifically intend to permit removal of complaints asserting only state law or rather whether it is sufficient for Congress to intend to create exclusive federal claims and remedies and to leave no room for the states. The latter form of intent was present in each of this Court's two decisions finding complete preemption, while the *Taylor*

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[10] *See also* Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L. Rev. 927, 929 (1996) (declaring that lower courts are "in a disquieting state of disarray")

[11] For efforts to categorize the lower courts' applications of the complete preemption doctrine, see Jordan, *supra*, at 964-980, and Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 295-303 (1993).

decision (but not *Avco*) also found express attention to removal in the legislative history.

This issue is at the heart of this case. Under the standard requiring express intent to permit removal, adopted by the Eleventh Circuit in its decision below, it is impossible for statutes adopted prior to removal jurisdiction, such as the NBA, to pass muster, and it is extremely difficult for statutes enacted prior to the Court's recognition of complete preemption. While some courts of appeals agree with the Eleventh Circuit that there must be an expression of specific congressional intent to permit removal,[12] other courts of appeals look instead to congressional intent to create a federal claim eliminating all possibility of state-law claims.[13] They

[12] *See, e.g.*, *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311 (3d Cir. 1994) (stating that a finding of complete preemption requires, in addition to a federal cause of action, a clear showing of congressional intent to permit removal); *cf. Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998) (narrowing circuit application of complete preemption doctrine to "the very narrow range of cases where 'Congress has clearly manifested an intent' to make a specific action within a particular area removable.") (quoting *Taylor*, 481 U.S. at 66).

[13] *See, e.g.*, *Strong v. Telectronics Pacing Sys., Inc.*, 78 F.3d 256, 260 (6th Cir. 1996) ("[C]ongressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule."); *Schmeling*, 97 F.3d at 1343 (10th Cir.) (considering statute's "provision of a federal cause of action to enforce the [federal law]" as determinative of whether "Congress intended to allow removal in such cases"); *Nahas*, 930 F.2d 608, 612 (8th Cir.) (exclusive federal remedy supports removal under doctrine of complete preemption); *cf. Cahnmann v. Sprint Corp.*, 133 F.3d 484, 490 (7th Cir. 1998) (holding, without specific mention of complete preemption, that federal remedy was exclusive and that "because federal law has extinguished the state law basis under which [the claim] might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint").

consider that intent sufficient to establish federal "arising under" jurisdiction for purposes of removal.

Where Congress has created an exclusive federal claim and remedy, as in this case, there is no rational reason to assume that Congress meant to tolerate evasions of the defendant's invocation of federal jurisdiction through pleading a patently non-existent state claim.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

[April 3, 2002]

No. 01-11863

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Appellants,

v.

H&R BLOCK, INC., Beneficial National Bank, *et al.*,
Defendants-Appellees.

Before TJOFLAT, BARKETT and WILSON, *Circuit Judges*.

WILSON, *Circuit Judge*:

The issue we decide on this appeal is whether the plaintiffs" state-law usury claims are completely preempted by the National Bank Act (NBA), 12 U.S.C. §§ 85 and 86, and therefore properly removable to federal court. Although the plaintiffs alleged only state-law claims in their complaint, the district court determined that it had jurisdiction based on the doctrine of complete preemption. We disagree and reverse.

BACKGROUND

The plaintiffs, who as customers of H&R Block, Inc. had taken out tax refund anticipation loans [1] from Beneficial

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[1] In a tax refund anticipation loan, a customer receives the amount of her anticipated tax refund, less fees charged by the lender and the tax preparation service, and in return authorizes the government to deposit the tax refund directly into an account at the bank to repay the loan.

National Bank, brought suit in state court against H&R Block, Beneficial National Bank, and Beneficial Tax Masters, Inc., alleging usury violations [2] along with other state-law claims. The defendants removed the case to federal court on the basis of federal question jurisdiction. The defendants argued that since the NBA provides the exclusive remedy for claims alleging excessive interest against national banks, the plaintiffs" state-law usury claims should be recharacterized as federal claims under the doctrine of complete preemption. The plaintiffs moved to remand the case back to state court, arguing that while §§ 85 and 86 of the NBA may provide a defense to state-law usury claims, these provisions do not accomplish complete preemption. The district court denied the motion to remand, holding that removal was proper because federal question jurisdiction existed based on complete preemption. Recognizing that the issue was unsettled in this Circuit, the district court certified for interlocutory appeal the question of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims so as to confer removal jurisdiction. We hold that these sections do not accomplish complete preemption.

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[2] The plaintiffs alleged that the defendants charged excessive interest in violation of *Alabama Code* § 8-8-1 and the common-law usury doctrine. In addition to the usury claims, the complaint included claims for intentional misrepresentation, suppression of material facts, and breach of fiduciary duty.

DISCUSSION

The question of whether §§ 85 [3] and 86 [4] of the NBA completely preempt state-law usury claims against a national bank has been the subject of disagreement among other circuits and among district courts within this Circuit.[5] What

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[3] Section 85 provides, "Any [national bank] may take, receive, reserve, and charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . ." 12 U.S.C. § 85.

[4] Section 86 provides,

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. § 86.

[5] While the Eighth Circuit has held that § 86 completely preempts state-law usury claims, *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir.1991), the Third Circuit disagreed in *Spellman v. Meridian Bank*, 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996), *Rehearing in Banc Granted, Opinion Vacated* (Feb. 16, 1996). After the Third Circuit vacated the panel decision and ordered a rehearing en banc, the parties settled and the complete preemption issue was left undecided. 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998).

Within this Circuit, district courts also have reached different results. *Compare Monday v. Coast to Coast Wireless Cable*, M.D. Ala.1997, 1997 WL 114874 (Nos. CV-96-A-1321-N, CV-96-A-1539-N, CV-96-A-1720-N, CV-96-A-1722-N, CV-96-A-1723-N, CV-96-A-1725-N, Feb. 19, 1997) (holding §§ 85 and 86 completely preempt state-law claims within their scope), *with Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350, 1356-58, 1360 (S.D.Ala.2000) (reaching the opposite conclusion).

is at stake in this inquiry is whether §§ 85 and 86 not only provide a defense to state-law usury claims under ordinary preemption, but also confer on defendants the ability to remove the case from state to federal court under the complete preemption doctrine. For the reasons that follow, we hold that §§ 85 and 86 do not accomplish complete preemption. We begin by describing the complete preemption doctrine and analyzing how the doctrine has been applied by the Supreme Court and this Court. Our analysis reveals that the complete preemption inquiry turns on congressional intent—whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum. We conclude that §§ 85 and 86 of the NBA do not accomplish the extraordinary result of complete preemption, because clear congressional intent to permit removal under these sections is lacking.

I

Whether a district court may exercise jurisdiction over this case based on complete preemption is a question of law that we review de novo. *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999). As courts of limited jurisdiction, lower federal courts may decide a case only when Article III of the Constitution provides that the federal judicial power extends to the case and when Congress has granted jurisdiction. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999). When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress"s authority to demarcate the jurisdiction of lower federal courts, and with the states" authority to resolve disputes in their own courts. *Id.* at 409-10. For this reason, when there are doubts as to whether removal jurisdiction is proper, we favor remand of removed cases. *Id.* at 411.

The removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in state court may be removed to federal court by the defendant as long as the federal court has jurisdiction in the case. Removal based on federal question jurisdiction, the grounds for removal the district court found here, generally is governed by the "well-pleaded complaint" rule, which provides that a case may be removed only if the plaintiff"s properly pleaded complaint reveals that the claim is based on federal law. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9- 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Under the well-pleaded complaint rule, a case in which the plaintiff asserts only state-law claims may not be removed to federal court based on the existence of a federal defense—even the defense of ordinary preemption. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "Congress has long since decided that federal defenses do not provide a basis for removal." *Id.* at 399, 107 S.Ct. 2425.

An exception to the well-pleaded complaint rule is the "complete preemption" doctrine. *BLAB T.V.*, 182 F.3d at 854. Under this doctrine, a defendant may remove a case to federal court even though the plaintiff raises only state-law claims in her complaint, when "the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."[6] *Caterpillar*

[6] We have recognized that the doctrine of complete preemption often is confused with the defense of ordinary federal preemption. *BLAB T.V.*, 182 F.3d at 854-55. Ordinary preemption is a defense that may be raised in state court as well as in federal court. *Id.* at 855. As a defense, ordinary preemption does not appear in the plaintiff"s well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar Inc.*, 482 U.S. at 393, 107 S.Ct. 2425. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB T.V.*, 182 F.3d at 854.

Inc., 482 U.S. at 393, 107 S.Ct. 2425 (internal quotation marks omitted).

The Supreme Court has found complete preemption under two federal statutes—section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a). *BLAB T.V.*, 182 F.3d at 855. The complete preemption doctrine was born with little elaboration or explanation in *Avco Corp. v. Aero Lodge Number 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 560-62, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), where the Supreme Court treated the plaintiff's state-law claim based on a collective bargaining agreement as a federal claim arising under section 301 of the LMRA, and held that the case was properly removed to federal court. The Supreme Court had not yet begun to use the term "complete preemption" to describe this result, and *Avco* provides little guidance on the scope of the complete preemption doctrine.[7]

[7] Karen A. Jordan, in *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927, 951 (1996), remarked that the Supreme Court in *Avco* "provided limited insight into the justification for its holding," since the Court "did not mention the well-pleaded complaint rule, nor did it explain why this case fell outside that rule." The Court explained the *Avco* decision in *Franchise Tax Board*, stating, "The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law. . . ." 463 U.S. at 23, 103 S.Ct. 2841 (footnote omitted) (internal quotation marks omitted).

Some courts describe as another example of complete preemption the Supreme Court"s decision in *Oneida Indian Nation of New York State v. Oneida County*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (agreeing with the Oneida Indian Nation that federal question jurisdiction existed over its right-to-possession claimbecause the possessory rights of Indian tribes necessarily arise under federal law and treaties). *BLAB T.V.*,

The Supreme Court provided more guidance on the contours of the complete preemption doctrine when it cautiously extended the doctrine to section 502(a) of ERISA in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 64-67, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The Court said that without clear indications that Congress intended to permit removal of state claims that fell within the scope of ERISA"s civil enforcement provision in section 502(a), the Court would have been "reluctant" to expand the "extraordinary pre-emptive power" recognized by the *Avco* decision under section 301 of the LMRA. *Id.* at 65, 107 S.Ct. 1542. After examining section 502(a), however, the Court did find clear indications of congressional intent to permit removal—explicit statements in the legislative history that Congress meant for this provision to be construed in the same fashion as section 301 of the LMRA, and close parallels between the jurisdictional subsection of ERISA"s civil enforcement provision and section 301 of the LMRA. *Id.* at 65-66, 107 S.Ct. 1542. Because Congress "clearly manifested an intent to make [these] causes of action . . . removable to federal court," the Supreme Court felt bound to "honor that intent" and find complete preemption. *Id.* at 66, 107 S.Ct. 1542.

Outside the contexts of the LMRA and ERISA, this Court has addressed the question of complete preemption only twice, in *Smith v. GTE Corp.*, 236 F.3d 1292, 1310-13 (11th Cir.2001) (holding that the Federal Communications Act did not accomplish complete preemption), and *BLAB T.V.*, 182 F.3d at 857-59 (holding that the Cable Communications Policy Act did not accomplish complete preemption). In those cases, we recognized that the complete preemption doctrine should be carefully limited in scope. We noted that "although the Supreme Court recognizes the existence of the

182 F.3d at 855 n. 2. *Oneida Indian Nation*, like *Avco*, does not use the term "complete preemption" and provides little guidance on when a court should or should not apply the complete preemption doctrine.

complete preemption doctrine, the Court does so hesitatingly and displays no enthusiasm to extend the doctrine into areas of law beyond the LMRA and ERISA." *Id.* at 856. We recognized that the Supreme Court only "reluctant[ly]" extended the complete preemption in *Taylor*, based on "virtually identical" jurisdictional provisions in the LMRA and ERISA and explicit statements in the legislative history of ERISA that the two statutes should be construed in a like manner. *Id.* at 855 (alteration in original) (internal quotation marks omitted). Finding no similar clear manifestation of congressional intent to permit removal in *BLAB T.V.* or *Smith*, we held that the complete preemption doctrine did not create federal jurisdiction in those cases. *Smith*, 236 F.3d at 1313; *BLAB T.V.*, 182 F.3d at 858.

In determining whether Congress intends for a federal statute to completely preempt state-law claims, courts consider a variety of factors such as "whether the state claim is displaced by federal law under an ordinary preemption analysis, whether the federal statute provides a cause of action, what kind of jurisdictional language exists in the federal statute, and what kind of language is present in the legislative history to evince Congress"s intentions." *BLAB T.V.*, 182 F.3d at 857. While we have declined to adopt a specific test for this Circuit, we recognize that all of these tests have the same ultimate goal:

> "to determine whether Congress not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either in a state or federal court, but *also intended to grant a defendant the ability to remove* the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal [one]."

Id. (emphasis added) (alteration in original) (quoting Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition,* 76 Tex. L.Rev. 1781, 1797-98 (1998)). In sum, both the

Supreme Court and this Court have recognized that the "touchstone" of the complete preemption inquiry is congressional intent. *Taylor*, 481 U.S. at 66, 107 S.Ct. 1542; *BLAB T.V.*, 182 F.3d at 857.

II

Since congressional intent is the pivotal issue in the complete preemption inquiry, that is where we must focus our analysis of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims against a national bank. In enacting the NBA, did Congress merely intend for federal law to act as a defense to state-law usury claims against a national bank under ordinary preemption—a defense that just as well could be asserted in state court and applied by state judges? Or did Congress intend that national banks facing usury claims in state court should have the ability to remove the case to a federal forum?

The defendants argue that it would be impossible for a court to find in the NBA the striking indications of congressional intent to permit removal through complete preemption that the Supreme Court relied on in *Taylor*, because the NBA was enacted more than a decade before Congress gave federal courts general federal question jurisdiction, more than two decades before the development of the well-pleaded complaint rule, and more than a century before the articulation of the complete preemption doctrine.[8] Nonethe-

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[8] The Judiciary Act of 1875 gave lower federal courts general federal question jurisdiction and general removal jurisdiction in civil cases arising under the Constitution or federal law. Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 Vt. L.Rev. 673, 735-37 (1995). Between 1875 and 1887, when the Act was amended, "the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise*

less, the defendants argue that applying the complete preemption doctrine here would be consistent with Congress"s purposes because the historical context of the NBA indicates that Congress was suspicious of state interference with national banks.

The NBA was enacted in 1864 [9] in the midst of economic strife during the Civil War. The defendants cite to many statements in the congressional debates surrounding the enactment of the NBA that show Congress"s intent to protect the new national banks from unfriendly state legislation. For example, Representative Samuel Hooper of Massachusetts argued that the NBA was necessary so "the currency of the country may be within the control and regulation of a national law applicable to the whole country, instead of being controlled and regulated by State law as it has been heretofore," and stated, "I appeal to the members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking." Cong. Globe, 38th Cong., 1st Sess. 1451 (1864). Based on statements like this from the congressional debates, the defendants ask us to adopt the reasoning of Judge Anthony J. Scirica in his dissent in *Spellman v. Meridian Bank*, 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996) (Scirica, J., dissenting), *Rehearing in Banc Granted, Opinion Vacated*

Tax Bd., 463 U.S. at 10 n. 9, 103 S.Ct. 2841. However, since 1887, "[f]or better or for worse . . . a defendant may not remove a case to federal court unless the *plaintiff*'s complaint establishes that the case "arises under" federal law." *Id.* at 10, 103 S.Ct. 2841.

[9] Act of June 3, 1864, 13 Stat. 99 (repealing and superseding the similar Act of Feb. 25, 1863). The Act originally was titled "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," but its title was changed in 1874 to "The National Bank Act." 12 U.S.C. § 38.

(Feb. 16, 1996): that Congress clearly intended that the NBA alter federal state relations and protect national banks from state interference, and therefore the NBA completely preempts state law because "'Congress intended to have usury claims against national banks governed by a body of federal law which the federal courts would apply.'" 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998) (quoting *Spellman*, 1995 WL 764548, at *24 (Scirica, J., dissenting)).

While the congressional debates amply demonstrate Con gress's desire to protect national banks from state legislation, they do not demonstrate that Congress desired to protect national banks from facing suit in state court. *Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350, 1360 (S.D.Ala.2000) (acknowledging that the NBA was meant to protect against "unfriendly legislation by the States," but stating that "the evidence does not demonstrate . . . that Congress was so distrustful of the states" *judicial* systems"). Even before 1875, when Congress gave lower federal courts original federal question jurisdiction and general removal jurisdiction, Congress had provided in a handful of specific acts that federal law would both provide a defense and allow for removal from state to federal court.[10] When Congress enacted the NBA in 1864, it provided that suit could be

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[10] For instance, in the Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Aldermen of City of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247, 251, 18 L.Ed. 851 (1867); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L.Rev. 717, 720-21 (1986). The pre-1875 removal statutes are collected in Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 61-62 n. 22 (1927), and discussed in Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 143-60, 168 (1968).

brought in federal or state court, and it did not provide for removal.[11] Four years later, in the Act of July 27, 1868, Congress allowed for corporations organized under federal law to remove a case from state to federal court by filing a petition that they had a defense arising under federal law—but by amendment, Congress excepted national banks from this removal power. 15 Stat. 226-27 ("*And be it further enacted*, That any corporation, or any member thereof, *orther* [other] than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States . . . ." (alteration in original)). *See also* Cong. Globe, 40th Cong., 2d Sess. 4197-98 (1868); 7 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part Two*, 394-97 (1987). This legislative history compels us to reject the

[11] Although the 1863 Act provided for suit in federal court and did not mention state court, *see Mercantile Nat"l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558-59, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963), when Congress replaced the 1863 Act in 1864, section 57 of the Act provided for suit in either federal or state court: "'[S]uits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. . . .'" *Id.* at 568, 83 S.Ct. 520 (quoting 13 Stat. 116-17).

defendants" suggestion that the early history of national banks offers clear congressional intent to make claims under the NBA removable.

Since both the Supreme Court and this Court have recognized that congressional intent is the "touchstone" in the complete preemption inquiry, we also must reject the line of cases which have found complete preemption without inquiring into Congress's intent. The only circuit court opinions that are consistent with this suggestion are *M. Nahas & Co. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir.1991), and *Krispin v. May Department Stores Co.*, 218 F.3d 919, 922 (8th Cir.2000), which follows the M. Nahas & Co. reasoning. Without examining congressional intent, the Eighth Circuit found complete preemption in *M. Nahas & Co.* based solely on well-settled law that § 86 provides the exclusive remedy for usury claims against a national bank.[12] 930 F.2d at 612. However, in *Jones*, Chief District Judge Charles R. Butler, Jr. criticized the Eighth Circuit"s lenient complete preemption standard as inconsistent with Supreme Court and Eleventh Circuit precedent and held that the NBA did not completely preempt state-law usury claims so as to

[12] Federal law governs the amount of interest a national bank may charge, *Marquette Nat"l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978), and provides the exclusive remedy for usury claims against a national bank, *McCollum v. Hamilton Nat"l Bank of Chattanooga*, 303 U.S. 245, 247, 58 S.Ct. 568, 82 L.Ed. 819 (1938); *Evans v. Nat"l Bank of Savannah*, 251 U.S. 108, 109, 40 S.Ct. 58, 64 L.Ed. 171 (1919); *Farmers" & Mechanics" Nat"l Bank v. Dearing*, 91 U.S. 29, 32, 23 L.Ed. 196 (1875). But this does not provide an answer to the complete preemption inquiry—" "[C]omplete preemption principally determines not whether state or federal law governs a particular claim, but rather whether that claim will, irrespective of how it is characterized by the complainant, [serve as the basis for federal question jurisdiction].'" *BLAB T.V.*, 182 F.3d at 855 (alteration in original) (quoting *McClelland v. Gronwaldt*, 155 F.3d 507, 517 (5th Cir.1998)).

allow for removal. 115 F.Supp.2d at 1361. We consider *Jones* to be a sound application of the principles reflected in the complete preemption cases decided by the Supreme Court and this Court, and we take a similar approach here.

In *Jones,* the court concluded that the sole justification the *M. Nahas & Co.* holding—that § 86 provides the exclusive remedy for usury claims against a national bank—was not by itself sufficient to establish complete preemption. *Id.* at 1355-56. The court in *Jones* arrived at this conclusion by examining the Supreme Court"s analysis in *Taylor,* where before beginning its complete preemption inquiry, the Supreme Court acknowledged that ERISA preempted the plaintiff"s state-law claims and provided an alternative federal remedy. *Id.* at 1356 (citing *Taylor,* 481 U.S. at 64, 107 S.Ct. 1542). "Were the existence of an "exclusive federal remedy" the only requirement for complete preemption, the . . . Court would have concluded its analysis at this point and declared the plaintiff"s claims completely preempted." *Id.* However, the *Taylor* Court went on to say that it would be "reluctant" to find complete preemption on this basis alone. 481 U.S. at 65, 107 S.Ct. 1542. The *Taylor* Court then conducted a searching inquiry into congressional intent, focusing on the parallels to the LMRA and explicit statements in the legislative history that ERISA should be construed like the LMRA to find Congress had "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* at 66, 107 S.Ct. 1542. The *Jones* court concluded—and we agree—that the analysis in *Taylor* indicates that where there are no further indications of congressional intent to permit removal, the existence of an exclusive federal remedy generally will not be enough to achieve complete preemption. 115 F.Supp.2d at 1356.

The *Jones* court also noted that this Court uses a more demanding standard for complete preemption than the Eighth

Circuit used in *M. Nahas & Co. Id.* at 1355-56. "[T]he only justification offered by the *Nahas* Court for its ruling was that the National Bank Act accomplishes "ordinary" preemption of state law claims for excessive interest and provides an alternative federal cause of action for the preempted state claim." *Id.* at 1355. We previously have recognized that the mere provision of a federal cause of action cannot be dispositive in the complete preemption inquiry:

> If the creation of a federal cause of action served as the sole litmus test for congressional intent, complete preemption would apply to every federal statute that creates such a cause of action and complete preemption would be common rather than extraordinary. . . . Congress may create a federal cause of action without also providing sufficient evidence of its intent that state causes of action are to be considered as arising under the federal statute and thus removable to federal court.

BLAB T.V., 182 F.3d at 859 n. 3. Our precedent demands clear congressional intent to permit removal. Like the Supreme Court, we have not yet extended the complete preemption doctrine beyond section 301 of the LMRA and section 502(a) of ERISA. We cannot extend the complete preemption doctrine here, where clear congressional intent to permit removal is lacking.

CONCLUSION

Under our federal system, both state and federal courts are entrusted to faithfully follow federal law. *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247-48, 73 S.Ct. 236, 97 L.Ed. 291 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws."). State courts in Alabama—the forum from which the defendants sought removal—have a long history of faithfully applying the NBA. *E.g., Lowery v. First Nat'l Bank of Oneonta,* 239 Ala. 690, 196 So. 891, 892 (1940)

("The penalties imposed upon a national bank for charging a higher rate of interest than allowed by the law of the state where located are fixed by the Federal Banking Law."); *Florence R.R. & Improvement Co. v. Chase Nat"l Bank,* 106 Ala. 364, 17 So. 720, 721 (Ala.1895) ("[T]he penalty prescribed by the national banking statute for usurious discounting paper by national banks is exclusive, and those imposed by state statutes cannot be applied and enforced."); *Helms v. First Ala. Bank of Gadsden, N.A.,* 386 So.2d 450, 452 (Ala.Civ.App.1980) ("[S]ince Congress has provided the penalty for usury [with § 86], that action preempts the field, leaving no room for varying state penalties.").

Because state courts, like federal courts, are competent in determining when state-law claims are preempted by federal law, removal to a federal forum based on the doctrine of complete preemption has been the exception, not the rule. Recognizing that the complete preemption doctrine works to trump the well-pleaded complaint rule as well as the maxim that a plaintiff is the master of the complaint and may avoid a federal forum by relying exclusively on state law, the Supreme Court expanded the doctrine only "hesitatingly" when there was a clear showing of congressional intent to permit removal. *BLAB T.V.,* 182 F.3d at 856. Since we find no clear congressional intent to permit removal under §§ 85 and 86 of the NBA, we therefore hold that while these sections may provide a defense to state-law usury claims, they do not accomplish complete preemption so as to permit removal.

We therefore REVERSE the district court's order denying the plaintiffs' motion to remand and REMAND to the district court for further proceedings consistent with this opinion.

TJOFLAT, *Circuit Judge, dissenting*:

The majority decides today that the provisions in the National Bank Act ("NBA") addressing usurious interest, 12 U.S.C. §§ 85 and 86, do not completely preempt plaintiffs" state law claims, and, as a result, the claims are not removable to federal court. The majority bases this conclusion on an absence of legislative history confirming that the NBA"s drafters intended that cases of usurious interest be heard and decided in a federal forum. I do not disparage the majority"s emphasis on congressional intent as the touchstone of complete preemption analysis. Rather, I take issue with the majority"s narrow conception of congressional intent as something only inferable from an enactment"s legislative history, here the NBA"s. Sometimes Congressional intent is determined by looking to statutes already on the books.[1] In this case, I suggest that the Judiciary Act of 1789 ("Judiciary Act" or "Act"), ch. 20, § 9, 1 Stat. 76-77 (1789), is highly relevant in determining whether the drafters of the NBA intended that lawsuits seeking relief from usurious interest rates, which is what the plaintiffs seek here, be litigated in a federal forum.

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[1] "We do not start from the premise that [the statutory] language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant." *United States v. LaBonte,* 520 U.S. 751, 757, 117 S.Ct. 1673, 1677, 137 L.Ed.2d 1001 (1997). Likewise, our own precedent directs us to "begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner,* 216 F.3d 970, 972 (11th Cir.2000) (en banc). Legislative history is an oft-used and important tool in the task of statutory interpretation when ambiguities exist in the language. Still, "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Id.* at 976.

The Judiciary Act, enacted by the first Congress, established the federal judiciary. It created thirteen judicial districts, which became the organizational units of the lower federal courts. The degree of precision in language employed by the drafters of the Act indicates that they had a strong understanding of jurisdictional principles and their role in case management and development of the law. For some federal causes, they gave exclusive jurisdiction to the federal courts; for others, they provided that the district courts would have concurrent jurisdiction with *1049 the state courts.[2] Where the drafters saw the need for uniformity of decision or avoidance of state interference, they gave the district courts exclusive jurisdiction. "[S]uits for penalties and forfeitures incurred, under the laws of the United States" were put squarely in that category. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 76-77 (1789).

We must assume that Congress was well aware of this provision—in particular, the word "forfeiture"—when, seventy-four years later, in the midst of the Civil War, it enacted the NBA. Section 85, as reproduced by the majority in note four, defines usurious interest by relying on specific discount commercial paper rates or state rates. Section 86 provides a cause of action for a debtor who was wrongly charged, or who has already paid, such interest on a loan. Although the majority duplicated section 86 in note five, it is useful to do so again for purposes of focusing on the specific language employed:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a *forfeiture* of the entire interest which the note, bill, or other evidence

[2] For example, concurrent jurisdiction was provided with respect to "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9(b), 1 Stat. 77 (1789).

> of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action of debt, *twice the amount of the interest thus paid.*

12 U.S.C. § 86 (emphasis added). In sum, section 86 furnishes a victim of usurious interest two possible remedies: (1) the victim can obtain a judgment declaring *forfeiture* of the entire interest of the debt if usurious interest is sought; or (2) if such interest has already been paid, the victim may bring a suit to recover twice the amount collected as a *penalty* to the lender.

In the case before us, the plaintiffs claim that Beneficial National Bank, a national banking association, charged them usurious interest rates on tax refund anticipation loans. Plaintiffs" allegations are so unspecific that it is difficult to say whether the plaintiffs are seeking the forfeiture of the interest they are being charged or whether they are seeking twice the amount of interest they have paid or whether they are pursuing both remedies. I say this because there are twenty-six plaintiffs and the complaint does not tell us, with respect to any of the plaintiffs, (1) when the loan was made, (2) the terms of the loan, and (3) the status of the loan--that is, whether the plaintiff had paid any interest, and if so, how much, prior to filing suit. I assume that the plaintiffs" loans have not been paid in full. Therefore, to the extent they have paid interest, they are seeking, in the words of section 86, "twice the amount of the interest paid" and "forfeiture" of the amount still due.

The only way to avoid the operation of the Judiciary Act"s mandate that "suits for penalties and forfeitures incurred" be filed in federal court is to say that the NBA amended that mandate by implication.[3] In light of our statement in *Patel v.*

[3] Although the majority does not mention the Judiciary Act "suits for penalties and forfeitures" provision, and therefore does not discuss

Quality Inn South, 846 F.2d 700, 704 (11th Cir.1988), that "amendments by implication are disfavored," I suggest that this method of avoiding the Judiciary Act"s mandate is unavailable, and that the Act"s mandate should therefore dictate our decision.[4]

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whether the NBA amended that provision by implication, the majority does say that the reference to state courts in the NBA's "Venue of suits" provision forecloses the argument that the federal courts have exclusive jurisdiction of a claim of usury.

[4] That the majority has not considered the application of the Judiciary Act in this case is not surprising. As far as I know, no court faced with the jurisdiction issue we are deciding has considered the relevance of the Judiciary Act provision I rely on here. *See e.g., Spellman v. Meridian Bank,* 1995 WL 764548 (Nos. 94-3203, 94-3402, 94-3215 to 94-3218) (3d Cir.1996) (vacated on grant of rehearing en banc then appeal dismissed by parties after settlement); *M. Nahas. & Co. v. First. Nat"l Bank,* 930 F.2d 608 (8th Cir.1991); *Jones v. Bankboston, N.A.,* 115 F.Supp.2d. 1350 (S.D.Ala.2000).

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

[Filed Dec. 14, 2000]

No. CIV.A.00-A-1457-N

MARIE ANDERSON, *et al.*,
Plaintiffs,

v.

H & R BLOCK, INC.; Beneficial National Bank; and Beneficial Tax Masters, Inc.,
Defendants.

MEMORANDUM OPINION AND ORDER

ALBRITTON, *Chief Judge*.

I. INTRODUCTION

This cause is now before the court on a Motion to Remand, filed by the Plaintiffs, Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April DeLoach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, William Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, and Earline Young ("Plaintiffs") on November 22, 2000.

The Plaintiffs originally filed a Complaint against H & R Block, Inc.; Beneficial National Bank; and Beneficial Tax Masters, Inc. in the Circuit Court of Barbour County,

Alabama. The Complaint alleges counts of intentional misrepresentation (Court One); suppression of material facts (Count Two); breach of fiduciary duty (Count Three); usury violations (Count Four); and Alabama Code Violations (Count Five).

H & R Block, Inc. ("H & R Block"), and Beneficial National Bank and Beneficial Tax Masters (collectively "Beneficial") filed a Notice of Removal in this court on October 24, 2000. Removal was based upon the presence of a federal question through complete pre-emption under the National Bank Act ("NBA"). The Plaintiffs state they have asserted only state law claims and contest that the NBA completely pre-empts these claims.

For the reasons herein discussed, the Motion to Remand is due to be DENIED.

II. FACTS

The Plaintiffs' claims arise out of representations made and interest and fees charged in connection with loans made to them through H & R Block by Beneficial. According to Beneficial, these loans were tax refund anticipation loans which are loans made to a tax return preparation service by a bank in the amount of the customer's anticipated tax refund, less the fees charged by the lender and the tax preparation service.

The Plaintiffs allege that the Defendants charged each of them interest in excess of the legal limit on interest rates allowed under Alabama law and the common law doctrine of usury. The Plaintiffs also allege that the Defendants misrepresented and failed to disclose the interest rate and the fees that would be charged, and breached their fiduciary duties to the Plaintiffs.

III. REMAND STANDARD

Federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994); *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (1994); *Wymbs v. Republican State Executive Committee*, 719 F.2d 1072, 1076 (11th Cir.1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1600, 80 L.Ed.2d 131 (1984). As such, federal courts have the power only to hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen*, 114 S.Ct. at 1675. Because federal court jurisdiction is limited, the Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear. *See Burns*, 31 F.3d at 1095.

IV. DISCUSSION

Removal of a case to federal district court by a defendant is only proper if the case brought by the plaintiff in state court originally could have been brought in federal court. *See* 28 U.S.C. § 1441(a). In this case, Beneficial and H & R Block argue that the court has jurisdiction over the Plaintiffs' claims because of the presence of a federal question. Federal question jurisdiction requires that the action arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. In deciding whether a federal question exists, the court must apply the well-pleaded complaint rule whereby the court looks to the face of the complaint, rather than to any defenses asserted by the defendant. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Consequently, the general rule is that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption. *See Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425. In this case, the Plaintiffs have only asserted state law claims so that, on the face of the Complaint, there is no federal question jurisdiction.

There is, however, an exception, or corollary, to the well-pleaded complaint rule and it is this exception to which Beneficial and H & R Block point in claiming that this court has federal question jurisdiction. This exception is known as the "complete pre-emption" doctrine. This exception is recognized in the rare instance Congress so "completely pre-empts a particular area that any civil complaint . . . is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The situations in which the complete pre-emption exception applies are so rare that the Supreme Court has found complete pre- emption in only a few areas. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (§ 301 of the LMRA completely pre-empted a state cause of action for violation of contracts); *Metropolitan Life*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (§§ 502(a)(1)(B) and 502(f) of ERISA completely pre-empted state contract and tort claims); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (federal law pre-emption with regard to tribal lands).

Beneficial and H & R Block have argued for the application of the complete pre-emption doctrine in the instant case based on §§ 85 and 86 of the National Banking Act ("NBA"). The NBA states in part, that a national bank "may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . ." 12 U.S.C. § 85. The NBA further provides for a civil enforcement mechanism. *See* 12 U.S.C. § 86.

Beneficial and H & R Block cite several cases, including a previous decision of this court, holding that §§ 85 and 86 of the NBA completely pre-empt state-law claims challenging interest charged by a national bank, and thus that such claims are removable from state to federal court. *See e.g., M. Nahas & Co. Inc. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608

(8th Cir.1991); *Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 (M.D.Ala. Feb.19, 1997); *Hunter v. Rich's Dept. Stores*, 945 F.Supp. 1500 (N.D.Ala.1995) (Propst, J.). There is, however, contrary case law on the issue of whether the NBA completely pre-empts state law claims challenging excessive interest. *See e.g., Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350 (S.D.Ala.2000).

The Eleventh Circuit recently addressed for the first time the issue of complete pre-emption outside of the Labor Management Relations Act ("LMRA") and the Employees Retirement Insurance Security Act ("ERISA") context. *See BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 855 (11th Cir.1999)(finding no complete pre-emption under the Cable Communications Policy Act of 1984). In *BLAB T.V.*, the Eleventh Circuit examined the different tests employed by various circuits in assessing complete pre-emption arguments. *Id.* at 856. While the court declined to adopt any of the tests to be applied to all future claims of complete pre-emption, the court did note that, while it relied heavily on a particular decision of the Tenth Circuit, it did not adopt the view of the Tenth Circuit that a statute's providing a federal cause of action is dispositive on the issue of congressional intent. *Id.* at 859, n. 3. The Eleventh Circuit held that a state law claim was not completely preempted by the Cable Communications Policy Act of 1984 because the court found that the requisite congressional intent to convert state law claims into federal claims was absent. *Id.* at 859.

This court has been presented with complete pre-emption arguments under the NBA on two previous occasions, both of which were decided before the *BLAB T.V.* decision by the Eleventh Circuit. *See Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 at *1 (M.D.Ala., Feb. 19, 1997); *Mason v. Fidelity Federal Bank*, 40 F.Supp.2d 1340 (M.D.Ala.1999).

In *Monday*, this court, relying on complete pre-emption analysis in other cases, looked at three factors: Congressional intent, whether the NBA displaced state law claims with a federal cause of action, and whether the jurisdictional language of the civil enforcement provisions paralleled the LMRA and ERISA. *Monday*, 1997 WL 114874 at *6-7. Noting that the NBA pre-dated the existence of federal question jurisdiction, the well-pleaded complaint rule, and the complete pre-emption doctrine, this court relied on discussions of Congressional intent in binding case law. *Id.* at *6. This court relied on statements in Supreme Court and former Fifth Circuit cases that the NBA was intended to give advantages to national banks over state competitors, and that an action stating a claim of usury against a national bank is a new right which is regulated by federal law, in concluding that Congress intended for national banks to be governed by national standards, not state law. *Id.* (citing *Roper v. Consurve*, 578 F.2d 1106 (5th Cir.1978), *aff'd sub nom. on other grounds, Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Marquette Nat. Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978); *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29, 35, 1 Otto 29, 23 L.Ed. 196 (1875)). This court further concluded that the jurisdictional language of the NBA was similar enough to the language used in the LMRA and ERISA, statutes which the Supreme Court has found completely preempt state law, to indicate that Congress intended for the federal remedy provided in the NBA to be the remedy which was available against national banks, whether the forum be federal or state, there being no mechanism for removal to federal court at the time. *Id.* at *7.

Although this court did not have the analysis in *BLAB T.V.* before it when *Monday* was decided, the court finds that the *BLAB T.V.* decision does not alter its conclusion in *Monday* that §§ 85, 86 completely preempt state law claims claiming

usurious interest. The Eleventh Circuit merely underscored the importance of Congressional intent in *BLAB T.V.*, and as noted above, this court's analysis in *Monday* was premised in large part on Congressional intent. While the NBA, because it pre-dated the relevant jurisdictional statutes and doctrines, may not neatly fit into the complete pre-emption analysis of modern statutes, this court finds that there is sufficient evidence in decisional law and the language of the NBA from which to conclude that Congress intended for national banks to be held to national standards, and not to be held liable under state law on claims alleging usury. Therefore, finding no reason to depart from its earlier analysis, the court again concludes that usurious interest claims are completely pre-empted under the NBA.

In the two cases in which this court was previously presented with an argument of complete pre-emption under the NBA, the court determined that there was no federal jurisdiction because the plaintiffs had not alleged claims of usurious interest, which is the type of claim that is completely preempted under the NBA. *See Monday*, 1997 WL 114874 at *10; *Mason*, 40 F.Supp.2d at 1345. In this case, the Plaintiffs have pleaded a claim for usurious interest. *See* Complaint, Count Four; Brief in Support of Motion to Remand, page 8. Accordingly, the Plaintiffs have brought a claim which is completely preempted by the NBA, creating federal question jurisdiction in this court.

The court recognizes that, while it has found evidence of Congressional intent to completely pre-empt state law usurious interest claims under the NBA, there is significant disagreement among courts over the presence of Congressional intent to completely pre-empt state law claims under the NBA. *See Jones*, 115 F.Supp.2d at 1357. The court further notes that the *BLAB T.V.* decision came before the Eleventh Circuit as a question certified for interlocutory appeal by the district court. *BLAB T.V.*, 182 F.3d at 854.

This court is willing to certify the issue of complete pre-emption in this case for interlocutory appeal, if any of the parties indicate their desire for the court to do so by filing a written request by December 29, 2000.

V. CONCLUSION

For the reasons discussed above, this court has federal jurisdiction by virtue of the presence of a federal question in this case. Accordingly, the Motion to Remand (Doc. # 7) is due to be and is ORDERED DENIED.

ORDER

For good cause shown, it is hereby ORDERED that the Memorandum Opinion and Order of this court entered on December 14, 2000 is AMENDED to add the following paragraph:

> This order involves the issue of whether the court has jurisdiction to proceed with this case. Therefore, pursuant to 28 U.S.C. § 1292(b), the court certifies that it is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is, therefore, FURTHER ORDERED that if the Plaintiffs make application for an appeal within ten (10) days after the entry of this order, pursuant to 28 U.S.C. § 1292(b), these proceedings are STAYED pending a determination of the application by the Court of Appeals and, if the appeal is permitted, final determination of the appeal by the Court of Appeals.

The Clerk is DIRECTED to serve copies of this Order by facsimile.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 29, 2002]

No. 01-11863-JJ

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Apellants,

versus

H&R BLOCK, INC., BENEFICIAL NATIONAL BANK, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: TJOFLAT, BARKETT and WILSON, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

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§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency,

province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

APPENDIX E

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

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§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

APPENDIX F

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

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§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun. 17, 2002]

No. 01-11863-JJ

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Appellants,

versus

H&R BLOCK, INC., BENEFICIAL NATIONAL BANK, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ORDER:

( ) The motion of Appellees', Beneficial National Bank and Beneficial Tax Masters, Inc., for (X) stay and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The Motion of Appellees' Beneficial National Bank and Beneficial Tax Masters, Inc., for (X) stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 27, 2002, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The

Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-11863J

MARIE ANDERSON *et al.*,
Plaintiffs-Appellants,

v.

H&R BLOCK, INC.; BENEFICIAL NATIONAL BANK; AND BENEFICIAL TAX MASTERS, INC.
Defendants-Appellees.

On Appeal from an Order ff the United States District Court for the Middle District of Alabama No. 00-A-1457-N
The Honorable W. Harold Albritton

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF DEFENDANT-APPELLEE BENEFICIAL NATIONAL BANK REQUESTING AFFIRMANCE OF THE DISTRICT COURT RULING

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June 2001

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The amicus curiae adopts the list of 48 interested persons found in Brief of Appellants-Plaintiffs (pp. i-iii) and makes the following additions thereto:

Office of the Comptroller of the Currency

Julie L. Williams
Daniel P. Stipano
L. Robert Griffin
Ernest Clifford Barrett, III

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this Brief is Times New Roman, 12 point.

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INTEREST OF THE AMICUS CURIAE

The Office of the Comptroller of the Currency ("OCC") is a bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, and the supervision of national banks. The OCC, whose chief officer is the Comptroller of the Currency, has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of banks organized under the National Bank Act, including the power to determine whether a bank's activities are permissible under national banking laws. *See Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir.1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir.1980). Appellee Beneficial National Bank USA, New Castle, Delaware, is a national bank chartered and supervised by the OCC.

This case turns on the interpretation of the usury provisions of the National Bank Act, 12 U.S.C. §§ 85 and 86. As the district court noted, a long line of precedent supports the conclusion that those provisions establish an exclusively federal remedy for allegations that a national bank has charged excessive rates of interest, thereby foreclosing any state law cause of action for usury. The OCC believes that the district court correctly held, on that basis, that the federal remedy has occupied the field of usury claims against national banks, supporting removal to federal court under the doctrine of "complete preemption." Accordingly, the OCC is vitally interested in this case as the federal agency charged with interpreting the National Bank Act and with protecting the safety and soundness of the national banking system. Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the OCC files this brief *amicus curiae* in support of defendant-appellee Beneficial National Bank urging affirmance of the decision below.

ISSUE PRESENTED

Whether the doctrine of "complete preemption" displaces a state cause of action alleging violations of Alabama usury laws by a national bank, thereby authorizing removal of the case to federal court under 28 U.S.C. § 1441.

SUMMARY OF ARGUMENT

When enacting the National Bank Act in 1864, Congress tried to assure that the new national banks would benefit from a national standard governing the interest rates that the new banks could charge on their loans. This standard, now codified in 12 U.S.C. § 85, allows a national bank to "charge on any loan or discount made . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . .," and it is complemented by a remedy, found in 12 U.S.C. § 86, for any violations. Under this remedy, the borrower must institute "an action in the nature of an action of debt" to recover the amount specified in the statute, and must do so "within two years from the time the usurious transaction occurred." Subsequent Supreme Court decisions, mindful of the Congressional concern to protect the new banking system from unfriendly state legislation as well as the system's need for uniformity, declared that these two sections "cover the entire subject" and are "exclusive."

As the Eighth Circuit has held, any usury claim against a national bank is federal in nature, and this, together with the exclusive federal remedy in § 86, effects "complete preemption" of state causes of action against a national bank for violations of state usury law. Thus, such actions should be removed to federal court. Explicit Congressional authorization for removal is unnecessary because the statutes themselves, as interpreted in early Supreme Court decisions, reflect legislative intent to create an exclusive federal forum.

INTRODUCTION

I. Complete Preemption

Title 28 U.S.C. § 1441 (a) authorizes removal to federal court of state court actions that "arise under the laws of the United States." whether the federal court has the necessary federal question jurisdiction to hear the case after removal depends on whether the "action aris[es] under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. In making this determination, courts apply the well-pleaded complaint rule, which generally calls for the court to look to the face of the complaint, rather than to any defenses (such as "traditional" or "ordinary" preemption) asserted by the defendant, to determine whether the case presents a federal question supporting removal. There is, however, an exception to the well-pleaded complaint rule known as the "complete preemption" doctrine. This exception recognizes that, in certain cases, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.* ,182 F.3d 851, 854 (11th Cir.1999). In such cases, purported state law claims are converted into claims stating a federal question, and therefore removal is proper. Here, the OCC believes the National Bank Act's usury provisions, 12 U.S.C. §§ 85-86, dictate application of the "complete preemption" doctrine.

II. National Bank Usury Law

The origin of national bank usury law dates back to the mid-19th Century, and reflects Congress's desire to have a uniform national currency and banking system. At the outbreak of the Civil. War, circulating currency in the United States consisted of notes issued by state chartered banks. The uncertain nature of the security backing these notes and the

need for a uniform currency to pay Union troops culminated in the passage of the National Currency Act of 1863,12 Stat. 665. This act provided for a national currency to be circulated by a new system of privately owned banks chartered by a new Treasury Department bureau headed by the Comptroller of the Currency. The following year, the National Currency Act was replaced by the National Bank Act of 1864,13 Stat 99, which carried over many provisions of the 1863 act and added others. *Howard H. Hackley, Our Baffling Banking System—Part I*, 52 Va. L. Rev. 565, 569-571(1966); Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290-297 (1970); Ross M. Robertson, *The Comptroller and Bank Supervision* 36-54 (1995 ed.). The legislative debate reflected a Congressional assessment that the National Bank Act was essential to the nation's survival, and that threats to the new banking system from existing state banks should be reduced or eliminated. During the debates, Congressman Hooper remarked,

> I believe the existence of the nation is at stake upon this issue; that the present necessity requires the use of every legitimate means to sustain the credit of the Government; . . . I appeal to the members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking.

Cong. Globe, 38th Cong., Ist Sess. 1451 (1864). Reviewing this history, one appellate judge observed, "[I]t is clear that the National Bank Act was a significant exercise of Congressional authority, intended by Congress to alter federal-state relations." *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548 at *22 (3d Cir.1995)(dissent by Scirica, J.)

An important feature of both the National Currency Act and the National Bank Act was the rate of interest that a national bank may charge on its loans. *See* National Currency

Act, § 46, 12 Stat. 665, 678-679 (1863), and National Bank Act, § 30,13 Stat. 99,108 (1864). Loans typically constitute the predominant asset on a bank's balance sheet, so interest is a principal component of virtually every bank's income. Moreover, as Rep. Hooper's comment suggests, Congress in 1863-1864 was intensely aware of the vigorous competition from state banks, many of which opposed the creation of the parallel national banking system. For these reasons, Congress enacted in section 30 of the National Bank Act *both* a national standard for determining the interest that the new banks could charge *and* an exclusive remedy for borrowers charged more than the allowed rate. 13 Stat.108. Section 30, later divided into two sections in amended form for codification as 12 U.S.C. §§ 85-86, "was considered indispensable to protect them against possible unfriendly state legislation." *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. 409, 412 (1874). Not only did the National Bank Act ensure a level playing field with state banks, but it also deliberately "gives advantages to national banks over their state competitors." *Id.* at 413; *Marguette Nat'l Bank v. First of Omaha Corp.*, 439 U.S. 299, 314 (1978)(national bank can charge an out-of-state borrower interest allowed by the bank's home state, even if such rate is higher than allowed by the state where borrower resides); Hackley, 52 Va. L. Rev. at 585-586. Thus, the remedy portion of § 30, now codified at 12 U.S.C. § 86, is fully consistent with Congress's desire for national uniformity and with national banks' favored status.

ARGUMENT

Congressional Intent to Provide an Exclusive Forum in the Federal Courts for Usury Actions against National Banks is Evident from the Plain Language of the Statute, is Consistent with Congress's Desire for Uniform Standards for National Banks, and has been Widely Recognized in the Courts.

I. The Plain Language Of The Statute

Congress's intent to establish an exclusive forum in the federal courts for usury actions against national banks is evident from the plain language of 12 U.S.C. §§ 85 and 86. Under 12 U.S.C. § 85, a national bank may charge interest "at the rate allowed by the laws of the State. . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank . . . ." Under 12 U.S.C. § 86, knowingly charging "a rate of interest greater than is allowed by section 85 . . . shall be deemed a forfeiture of the entire interest. . . ." Where excessive interest has been paid, "the person by whom it has been paid . . . may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid . . . *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

Twelve U.S.C. §§ 85 and 86 are inextricably linked. Just as 12 U.S.C. § 85 establishes a national standard for determining permissible rates of interest on a national bank's loans, 12 U.S.C. § 86 provides the exclusive remedy for a borrower alleging that the interest exceeds what is permitted by § 85. Moreover, both of these sections were derived from § 30 of the National Bank Act. Thus, §§ 85 and 86, "examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject. *Farmers and Mechanics Nat 'l Bank v. Dearing*, 91 U.S. 29, 32 (1875). There, the Supreme Court agreed with the bank that the penalty for usury was "forfeiture of the entire interest" as prescribed in § 86, not declaring the note "void" as required by New York law. This was a reasonable conclusion, since it seems highly unlikely that Congress would enact a law that sets a uniform standard

for rates and in the same section of that law provide a uniform remedy for violations, while simultaneously contemplating the adjudication of state law remedies in a non-federal forum. Rather, section 30 of the National Bank Act created a new and exclusive federal cause of action, and "the power to supplement it by state legislation is conferred neither expressly nor by implication." 91 U.S. at 35. See also *McCollum v. Hamilton Nat'l Bank of Chattanooga*, 303 U.S. 245, 247-249 (1938) ("Punishment for usury does not depend upon payment of the borrower's debt" but "shall be paid according to the terms of the statute" without consideration of aggravating circumstances or equitable considerations).

II. Uniform National Bank Standards

Congressional intent to provide an exclusive forum in the federal courts for usury actions against national banks is consistent with Congress's overall intent to have uniform standards for national banks. The need for a uniform remedy for usury violations has its origin in the unique purposes for which the national banking system was created. Through the national charter, Congress has established a banking system intended to be both nationwide in scope and uniform in character. As stated in *Easton v. Iowa*, 188 U.S. 220, 229 (1903), federal legislation affecting national banks "has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *See also Davis v. Elmira Say. Bank*, 161 U.S. 275, 283 (1896) ("This freedom from State control over a national bank's powers protects national banks from conflicting local laws unrelated to the purpose of providing the uniform, nationwide banking system that Congress intended."); *Farmers' and Mechanics' Nat'l Bank*, 91 U.S. at 33-34 ("The national banks organized under the [National Bank] Act are instruments designed to be used

to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give.'") (internal citation omitted); *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 369 (1923).

The uniformity theme is echoed in § 30 which, as enacted in 1864, embodied both a standard for determining the interest rate and a detailed procedure for an overcharged borrower to obtain redress. In this way, § 30 "establishes a system of general regulations" for determining "whether transactions by [a national bank] are usurious and the consequent penalties therefore" *Evans v. Nat 1 Bank of Savannah*, 251 U.S.108, 109, 111(1919).

III. Applicable Court Precedents

Numerous courts, including the Supreme Court, have recognized that federal courts provide an exclusive forum for usury actions against national banks. Thus, from the beginning, the Supreme Court has recognized that the cause of action created by § 86 forecloses any parallel state usury cause of action against a national bank. *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555, 558 (1879) ("Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive"). For more than a century, the Alabama Supreme Court has recognized the exclusive federal penalty in § 86. *Florence R.R. & Improvement Co. v. Chase Nat'l Bank*, 17 So. 720, 721 (Ala. 1894). Because the same legislation that brought national banks into existence precluded application to them of state usury laws except to ascertain the permissible interest

rate, no state law cause of action for usury has ever existed against national banks. Accordingly, no subject matter area could be more "completely preempted" by federal law within the meaning of *Metropolitan Life, supra*.

More recently, the federal appellate courts have affirmed that state law has no role in setting the penalty for usury committed by a national bank. In *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975), the Eighth Circuit rejected the argument that national banks should be subject to state rather than federal penalties. Citing *Evans v. Nat'l Bank of Savannah, supra*, the court said:

> To hold otherwise in the instant case would jeopardize the national banking system by allowing the states to set penalties for violations of federal law. That is patently contrary to the congressional policy of assuring national banks parity with state banks and most favored state lenders. Furthermore, since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties.

509 F.2d at 881.

In 1991, the Eighth Circuit took this reasoning one step further in *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608 (8th Cir.1991). There, the court concluded that the exclusive federal remedy, created by Congress over 100 years.ago to prevent the application of overly punitive state law usury penalties against national banks, is squarely within the complete preemption doctrine of *Avco Corp. v. Aero Lode No. 735*, 390 U.S. 557 (1968). Thus, while the complaint in that case, alleging a violation of Arkansas usury laws with the remedy to be found in the Arkansas Constitution, was couched wholly in state law terms, "it was necessarily federal in nature and properly removable." 930 F.2d at 612.

Subsequent case law on the applicability of the complete preemption doctrine to usury claims against national banks is in accord. *Fortenberry v. Southtrust Bank of Alabama*, N.A., 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. 1996) (removal is proper because plaintiff's action is federal in nature); *Goehl v. Mellon Bank (DE)*, 825 F. Supp.1239,1243 (E.D. Pa. 1993) ("sections 85 and 86 of the NBA subsume the interests for which Plaintiffs seek vindication under state law. . . . [and] there is a clear indication of Congressional intent to permit removal" in such cases); *Watson v. First Union Nat'l Bank of South Carolina*, 837 F. Supp.146, 148-150 (D.S.C.1993) (vast majority of courts have concluded that complete preemption applies even when a complaint alleging national bank usury is based solely on state statutes setting the interest rate and the remedy for a usurious loan); *Ament v. PNC Nat'l Bank*, 825 F. Supp.1243, 1250 (W.D. Pa. 1992) (complete preemption applies because section 86 vindicates the same interest that plaintiffs seek to vindicate by their state law claims); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312, 316 (D. Minn. 1992) (removal is proper because usury claims, though grounded in Minnesota law, are necessarily federal in character).

Despite widespread agreement on the propriety of removing state causes of action against a national bank for usury, several courts have not permitted removal. One decision, *Jones v. Bank Boston, N.A.*,115 F. Supp. 2d 1350 (S.D. Ala. 2000), concluded that insufficient evidence of Congressional intent to allow removal can be found in the National Bank Act, and therefore the complete preemption doctrine, as explained in *Avco Core., supra, and BLAB T.V. of Mobile, Inc., supra*, does not apply. The court failed to recognize that the Supreme Court decided this very issue in *Farmers' and Mechanics' Nat'l Bank*, in *Barnet* and in *Evans*. Under those decisions, to which the Jones court either gave only cursory attention (*Farmers' and Mechanics'*) or failed to mention at

all (*Barnet, Evans*),115 F. Supp. 2d at 1357, the provision in § 30 of the National Bank Act of a framework of substantive law, together with an exclusive remedy "in an action in the nature of an action of debt" within two years of the usurious transaction, answers the question whether Congress intended to displace a state cause of action alleging state usury law violations by a national bank.

CONCLUSION

From the above, it is evident that the only viable means of recovery against a national bank for usurious interest is a federal cause of action that should appear on the face of a wellpleaded complaint. For purposes of the instant case, the law has been settled for over a century, even in the Alabama Supreme Court, so there are no issues for the state court to resolve. Where Congress clearly wished to displace state law by creating an exclusive federal remedy and stressed the importance of uniformity in the fledgling national banking system, a finding of complete preemption is appropriate. The lower court, by giving deserved weight to the historical context, the scheme set out in section 30 of the National Bank Act of 1864 and the decisional law interpreting the statutory language, properly applied the doctrine here by refusing to remand the case to state court.

Respectfully submitted,

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June 2001

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has a word count of less than 7,000 words, and complies with the length requirements specified in Fed. R. App. P. 32(a)(7).

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APPENDIX J

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF LOUISIANA

[Filed Jan 13, 1998]

DOUGLAS GALLAGHER, FERMIN TULLIER, PATRICK JUGE,
BONNIE GILBERT, HARRY BATISTE, JR, and JULIE DAVENPORT,

v.

H&R BLOCK EASTERN TAX SERVICES, INC., *et al*

RULING ON MOTION TO REMAND

This matter is before the court on a motion to remand by plaintiffs, Douglas Gallager, Fermin Tuller, Patrick Juge, Beonnie Gilbert, Harry Batiste, Jr, and Julie Davenport. Defendants, Eastern Tax Services, Inc., H&R Block, Inc., Block Financial Corporation, Danette Dagle, Paulette Landry, Lois Falcon, and Defendants A through Z (collectively "Block"), oppose the motion. Removal jurisdiction is allegedly based on federal question subject matter jurisdiction, 8 U.S.C. §1331.

Background

According to the memoranda and documents submitted by the parties in support therof, on July 8, 1997, plaintiffs filed a class action petition in the 18th Judicial District Court, Parish of Iberville, State of Louisiana, seeking to recover monetary compensation for damages and for attorney fees, for alleged financial harm by Block in a scheme to systematically target and deceive lower income, unsophisticated taxpayers out of "exorbitant" interest and fees. Plaintiffs allege that Block induced plaintiffs and other Louisiana residents to 1) pay a fee to Block to secure their tax refunds supposedly more

quickly than available elsewhere; and 2) pay outrageous finance charge for short term, fully secured loans from Block's lending banks.

The petition alleges that defendants are liable on the following count:1) fraudulent misrepresentation; 2) fraudulent concealment; 3) dual agency; and 4) breach of fiduciary duty.

Oh July 25, 1997, defendants filed a notice of removal.

Plaintiffs filed a motion to remand on August 15, 1997, on the grounds that 1) the claims by plaintiffs do not arise under federal law; and 2) if applicable, preemption would only be a defense to state law claims, and would not be grcunds for removal. Plaintiffs also request that the court assess attorney's fees against Block.

Defendants oppose the motion on the grounds that 1) the are substantial disputed questions of federal law in this case which are central to the claims by plaintiffs for recovery; and 2) plaintiffs have artfully pleaded in state law terms a completely preempted federal cause of action.

Arguments

Plaintiff argue that the state court petition alleges no federal claims, only violations of Louisiana law, prohibiting fraud, suppression, breach of fiduciary duty and dual agency. Plaintiffs argue that the court should not accept Block's distortion of the state law claims into a claim under the National Bank Act, 12 U.S.C. 21 *et seq.* because plaintiffs do not sue Block under the Act, nor cold they, because the *Act* regulates only the business of banking, and Block is not a bank. Plaintiff argue that Louisiana's interest in prohibiting Block from deceiving Louisiana residents into exorbitant interest obligations does not impact the purpose of the Act or any other federal law.

Plaintiffs also argue that Block's supposed preemption defense cannot create federal jurisdiction, because the National Bank Act does not apply for preemption purposes when no claims against a bank have been asserted.

Defendants argue that the issue of the agency or broker status of defendants in relation to notional banks is tantamount to their status as alleged "branch offices" "branch agencies", or "additional offices" of national banks conducting banking businesses which is a matter of federal law; thus ; defendants argue, the success of the allegations depends on determination of whether one or more of the Block defendants were "agents" or "brokers" of these national banks in allowing the transactions to occur. Defendants argue that plaintiffs all but name the national bank as parties by alleging that the Block defendants concealed the fact the they were actually creditors on the loans.

Defendants also argue that, under the complete preemption component of the "artful pleading" doctrine, plaintiffs rest their case against defendants on the deceptive collection of excessive interest from plaintiffs pursuant to loans actually made by one or more national banks, in violation of the interest rates authorized by the National Bank Act. Defendants argue that, if plaintiffs are willing to argue that Block is the legal surrogate of national bank lenders in the lending program, it follows that the preemptive effect of the laws that govern the national banks be applied to all aspects of the litigation, from the standpoint of liability, remedy and jurisdiction.

Law and Discussion

To support removal, defendant bears the burden of establishing federal jurisdiction over the state court suit.[1] Removal under section 144(b), the basis of removal here, is

[1] *Carpenter v. Wichata Falls Independent School District*, 44 F.3d 362, 365 (5th Cir. 1995).

appropriate only for those claims with the federal question jurisdiction of the district courts, that is, for those actions "arising under the Constitution, Laws, or treaties of the United States." [2]

A case "arises under" federal law when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of plaintiff's cause of action.[3] If, however, the state law created the cause of action, the court must determine whether plaintiff's demand "necessarily depends on resolution of a substantial question of federal law.[4]

Generally, a suit may not be removed from state court to federal court on the basis of a federal defense including the defense of preemption; however, under the "complete preemption doctrine", once an area of state law has been completely preempted, any claim based on the preempted state law is considered a federal claim and therefore arises under federal law.[5]

When plaintiff challenges the propriety of defendant's removal, defendant carries the burden of showing the necessary facts to support the court's exercise or removal jurisdiction.[6] Any doubts about the propriety of removal are construed in favor of remand.[7] The removal statute should be

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[2] 28 U.S.C. § 1331.

[3] *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

[4] *Id.*

[5] *Caterpillar Inc. v. Williams,* 482 U.S. 386, 107 S.Ct 2425, 96 L.Ed 2d 318 (1987).

[6] *See Jernigan v. Ashland Oil, Inc.* 989 F.2d 812, 815 (5th Cir. 1993); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936).

[7] *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979).

strictly construed against removal and all doubt should be resolved in favor of remand.[8]

The National Bank Act, 12 U.S.C. § 21 *et seq.*, governs the operations of national banking associations.[9] The background begins in 1863 and 1864, when the Civil War Congress enacted and then reenacted the National Bank Act, which launched the modem national banking system by providing for federal chartering of private commercial banks and empowering the newly created national banks to issue and accept a uniform national currency.[10] Authorizing national banks to "carry on the business of banking," the National Bank Act provides that such banks shall have power—

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking: by discounting and negotiation promissory notes drafts, bills of exchange, and other evidences of debt; by receiving deposit; by buying and selling exchange , coin, and buttons; by loaning money on personal security; and by obtaining , issuing, and circulating notes . . . The business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities and stock with out recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers,

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[8] *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868 85 L.Ed. 1214 (1941).

[9] *Jackson v. First Nat. Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965).

[10] *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), *citing* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99; E. Symons, Jr., & J. White, Banking Law 22-25 (3d ed. 1991); and 12 U.S.C. § 38.

and in no case for its own account, and the [banks]shall not underwrite any issue of securities or stock . . .," 12 U.S.C. § 24 Seventh (1988 ed. And Supp. V)." [11]

The National Bank Act, U.S.C. § 85, permits a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more." Further, 12 U.S.C. § 86 provides the penalty for usury against a national banks that "tak[es], receiv[es], or charg[es] a rate of interest greater than is allowed by Section 85." [12] Suits under sections 85 and 86 of the National Bank Act, and the predecessors of those sections, are federal question cases.[13]

Plaintiffs allege that the "Rapid Refund" program is a loan program administered by defendants *in association with banking institutions*. Plaintiffs allege that defendants solicted from their clients, *on behalf of various banks*, loans which were collateralized with the clients, on behalf of various banks, loans which were collateralized with the expected refund. Under the arrangement *with the banks which issue the loans*, plaintiffs allege, defendants *received a kickback from the banks* for each refund anticipation loan entered into by its clients. Plaintiffs allege that the true the relationship between defendants and the lenders was that *of broker or agent for the lender*. It is clear that plaintiffs have attempted to gain the liability and class action benefits of indentifying defendants with the banks but none of the jurisdictional consequences of the allegations.

The state court petition clearly alleges that the loans were made by the national banks through their agent, H&R black.

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[11] NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1195).

[12] 12 U.S.C. §§ 85-86.

[13] *Fourehem, Inc. v. Louisiana National Leashing Corp*, 723 F.2d 376 (Cir 1984).

The state court petition clearly attacks the validity of the loans made by the national banks. These allegations are sufficient to implicate the provisions of sections 85 and 86 of the national banks Act, even though the banks themselves are not now joined as parties to the action.

Although the National Bank Act regulates only the business of banking and named defendants are not banking associations, defendants have provided persuasive support for their claim which would place this matter under the National Bank Act. Plaintiffs may not escape federal jurisdiction by artfully omitting parties to the transactions that are the subject of this lawsuit.

Accordingly, for the reason assigned the motion by plaintiffs to remand is hereby DENIED.

/s/ John V. Parker
JOHN V. PARKER, Chief Judge
MIDDLE DISTRICT OF LOUISIANA